



ACTON BOARD OF APPEALS

Minutes of Executive Session

February 23, 2015 at 6:00 pm

Room 46, Acton Town Hall

The Board of Appeals held a duly-posted Executive Session on Monday, February 23, 2015 at 6:00 pm in Room 46 of the Acton Town Hall to discuss the remand hearing for *Walker Realty v. Town of Acton ZBA*, Land Ct. 09 MISC 405389.

Present at the Executive Session were Board of Appeal members, Jonathan Wagner, Richard Fallon and Adam Hoffman. Also present was Nina Pickering-Cook, from Town Counsel's Office, Scott Mutch, Zoning Enforcement Officer (ZEO), Roland Bartl, Town Planner and Cheryl Frazier, Board of Appeals Secretary.

Jon Wagner opened the meeting in open session at 6:00 pm.

Rick Fallon made a motion to go into Executive Session for the purpose of discussing litigation strategy for *Walker Realty v. Town of Acton ZBA*, Land Ct. 09 MISC 405389 and the impact of the ZBA's remand hearing on that litigation, after the Chair and Town Counsel made the declaration that discussing as much in open session would have a detrimental impact on the Town's litigating position. Adam seconded the motion.

Roll call:

- Rick Fallon - aye
- Adam Hoffman - aye
- Jon Wagner - aye

Executive Session Minutes:

The meeting began with Nina Pickering-Cook providing a background of the case, beginning with the plan originally proposed by Walker Realty ("Walker") in 2009 to construct a child care center on Main Street in Acton. Child Care Facilities are granted relief from local Zoning requirements based upon Chapter 40A Section 3 and what is commonly referred to as the "Dover Amendment" (although counsel pointed out the difference between paragraph two and three). Child Care Facilities are permitted as of right in all Zoning Districts throughout the Town. However, the dimensions of Child Care Facilities can be reasonably regulated by the local municipalities. That background is summarized as follows.

Nina explained that there have been three iterations of the child care center by Walker at this location (not including plans proposed in settlement). The project began in 2009 with an unfavorable Zoning Determination by the ZEO that was appealed to the ZBA. The ZBA found it unreasonable to apply certain dimensional regulations, namely net floor area, to Walker's proposed plan, but upheld the ZEO's determination that the plan violated floor area ratio maximum ("FAR") and found it was reasonable to require the applicant to comply with that requirement. The FAR on the proposed plan was approximately 0.23. Shortly after purchasing the property, the developer, Walker Realty LLC, razed the two existing homes.

In order to address the FAR requirement, Walker Realty then purchased the abutting Kennedy parcel. Walker then proposed a one-story child care center on the combined parcel moving Kennedy's to the lot closest to Route 2. This was known as Plan 2. Like Plan 1, Walker appealed the ZEO denial of zoning compliance to the ZBA. The ZBA found that it was reasonable to require the newly-amended net floor area limit of 2,500 sq. ft. to Plan 2.

Walker appealed both Plans 1 and 2 to the Land Court. There was a discussion about Plan 3, which was never properly appealed. There was a discussion as to whether the cases were officially consolidated in Land Court. Nina stated that they were at least administratively consolidated, but that the cases retained their own docket numbers and the Court has signaled that Walker could proceed with the appeal of Plan 1 if not successful.

Walker Realty moved for Summary Judgment prior to trial commencing but was denied by the Court. Trial was held in May 2014 and focused only on Plan 2. The major points of contention at trial was whether it was reasonable to require compliance with the 2,500 square foot maximum net floor area given the municipal concerns of traffic congestion/safety, aesthetics with the surrounding neighborhood and "the gateway theory" transitioning from a commercial district to a residential district. The visual concern from a Town Planning perspective is that the proposed structure does not fit into the surrounding neighborhood which consists of moderately sized single family residential dwellings.

The Decision issued on November 25th, 2014 by Justice Sands. Nina then reviewed the decision and the Court's findings in favor of Walker with respect to the traffic congestion/safety concerns and in support of Walker's argument that the proposed site is located within a mixed use district/area due to the existing veterinary clinic, public safety facility etc. and that their proposed facility would fit into the context of the existing area.

The focus of the discussion was the fact that J. Sands remanded the plan back to the ZBA for further discussion with Walker about a number of issues, namely (1) the size of the building, (2) traffic mitigation; and (3) landscape buffering. Nina explained that what that did, in essence, was provide a basis for Walker Realty to move forward with construction of a large scale Child Care Facility but perhaps not to the full extent of the approximately 20,000 square foot currently proposed facility. Nina further explained that the Court strongly suggested that a smaller facility in the range of approximately 12,000 square feet could perhaps be acceptable to both sides.

Walker's proposed plan on remand did not decrease the size of the building at all, but provided a left hand turning lane on Route 27 and some indication of some landscaping. The Board then discussed the various issues up for review and the extent of their purview. The Board raised concerns about having sufficient information provided to make any such determinations, particularly with respect to traffic. It was Nina's opinion that, based upon the court decision the Town has little leverage to negotiate modifications or changes regarding this project proposed on remand.

During the March 2, 2015 open public hearing, it is up to the discretion of the Board as how to proceed and respond to the current application. The three main points of contention will again include (1) maximum net floor area; (2) whether the traffic mitigation is sufficient; (3) the landscaping plan, as it were, and (4) minimum open space required. Scott Mutch explained other features that were non-compliant with current zoning but the Board was advised that their review was limited by any provision that the previous ZBA had waived on Plan 2.

The Chair and Rick Fallon had a number of questions concerning the procedural posture of the remand hearing. Nina was going to speak with them separately later in the week to answer those questions. The Board discussed that the remand would likely result in the following three options:

1. Approve the proposed plan with traffic mitigation and landscaping;
2. A denial of the 19,460 square foot (net floor area) proposed facility;
3. A denial of the 19,460 square foot (net floor area) proposed facility, but also conduct a straw vote of the Board suggesting that a smaller net square foot facility would be reasonable.

Jon asked for a motion to close the executive session and adjourn the meeting. Rick Fallon made such motion and Adam seconded the motion. Jon Wagner conducted the following roll call to close the executive session and adjourn the meeting:

- Rick Fallon - aye
- Adam Hoffman - aye
- Jon Wagner - aye